No. 16,108.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CORNELI SEED COMPANY,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

Appellee, Union Pacific, devotes its brief to two questions which are stated as follows:

> "1. Is the report and order of the Interstate Commerce Commission binding on the appellant and the court, or if not
>
> 2. Can the appellant carrier waive the plain terms or provisions of the applicable tariff, or condone a practice not authorized by the tariff?" (Appellee's brief, page 7).

The first question posed by Union Pacific joins issue with the appellant Corneli's Point III which asserts that this record presents only a question of law as to the interpretation of the tariff in question by reason of which neither the decision of the Interstate Commerce Commission, nor the District Court, is binding on this court.

Corneli submits the second question raises a false issue. It assumes that Corneli's contention is that Union Pacific waived or condoned a practice not authorized by the tariff.

Such is not the case. Corneli agrees that under the law Union Pacific could not waive compliance with tariff requirements (Corneli's brief, page 9). The question is not waiver, but rather whether or not the construction and practice mutually adopted by Union Pacific and Corneli whereby the transit tariff was complied with by furnishing inbound references after shipment rather than on outbound bills of lading, was a compliance with the tariff.

I.

We first consider Union Pacific's first contention that the decision of the Interstate Commerce Commission is binding on Corneli and this court. Inasmuch as the courts in some of the cases cited by Union Pacific and in the quotations printed in the brief, speak in terms of "estoppel," "res judicata," "election of remedies," "primary jurisdiction" and the "negative order doctrine," it will be helpful to first have in mind the meaning of these terms and doctrines before discussing the applicability of the decisions relied on. In 42 American Jurisprudence at page 698, paragraph 254, the doctrine of primary administrative jurisdiction is defined as follows:

> "The doctrine of primary jurisdiction is that the courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered."

In 42 American Jurisprudence at page 593, paragraph 202, the negative order doctrine is defined as follows:

> "Until the decision in Rochester Telephone Corp. v. United States was handed down, the right to judicial

review of administrative action was narrowed to a considerable extent by the so-called 'negative order' doctrine, under which Federal courts had denied their jurisdiction to review 'negative orders,' that is, orders in which the administrative authority merely refused to grant the relief sought. . . . The negative order doctrine rested primarily on two considerations, one involving the interpretation of the terms of the controlling statute which was construed to confer upon the court no jurisdiction to review orders requiring no affirmative action for their enforcement, and the other involving the erroneous assumption that review of a negative order would amount to a judicial determination de novo of the right to relief and thus constitute an exercise by the courts of administrative authority."

In 42 American Jurisprudence, page 703, paragraph 255, the principle respecting election of remedies is stated as follows:

"Where a remedy in the judicial or in the administrative forum is available to the same party in the same situation, he has his choice as to which remedy he will take. Sometimes the statute itself provides that a party must elect between the remedies and may not avail himself of both. Under such a statute, a party who elects to proceed before the administrative tribunal and is denied relief on the merits there, may not later bring the common-law action which he might have chosen in the first instance, and one who obtains relief on his claim in the administrative tribunal is bound by such award and may not later institute a common-law action to seek additional relief on the same claim."

49 U. S. C. A., Section 9, provides a shipper claiming to be damaged by a carrier may file a complaint either with the Commission or sue in a District Court. It is this sec-

tion which gives rise to Union Pacific's contention respecting election of remedies.

Another statutory principle in the scheme of adjudication of rights between carriers and shippers is that when reparations are awarded a shipper he must then sue the carrier for damages in the District Court, and although the Commission's reparation order makes a prima facie case the trial is de novo and by jury if desired. The action is in tort for damages [49 U. S. C. A., Section 16, Par. (2)]. Formerly when the relief was denied by the Commission and a claim dismissed, there was no judicial review under the Negative Order Doctrine. To correct this obvious disparity of treatment the United States Supreme Court repudiated the Negative Order Doctrine and the shipper may now have judicial review. United States v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451. It is also the law that the Commission has no jurisdiction to determine the liability of a shipper to a carrier, and that the courts have exclusive jurisdiction. The rule is stated as follows in Pennsylvania Railroad Company v. Fox & London, Inc., (2nd Cir. 1938), 93 F. 2d 669, l. c. 670:

> "Of course, the Interstate Commerce Commission only has such jurisdiction as has been conferred upon it by Congress, and that does not give it the power to make orders adjudicating claims of carriers against shippers and requiring the payment of such claims. See Davis v. Rochester Can Co., 220 App. Div. 487, 221 N. Y. S. 666, affirmed Mellon v. Rochester Can Co., 247 N. Y. 521, 161 N. E. 166; Laning-Harris Coal & Grain Co. v. St. Louis & San Francisco R. Co., 15 I. C. C. 37. So jurisdiction of such a controversy as this is vested exclusively in the courts."

The foregoing principle gives the shipper full opportunity to defend in court. The carrier's action is in contract.

Union Pacific's first contention may be summarized as follows:

1. That the Commission had exclusive "primary jurisdiction" of Corneli's complaint seeking to establish new routes and determine applicable and lawful rates for same and also for a determination that the combination of rates to and from Twin Falls were inapplicable, unjust and unreasonable and if so to grant reparations.

2. That the denial of reparations by dismissal of Corneli's petition was a final order not reviewed and constitutes the exercise of primary Commission jurisdiction such as to conclusively bind Corneli and effectively deprive it of any defense to Union Pacific's suit because (a) Corneli **elected** to bring the proceeding before the Commission, or (b) because Corneli is **estopped** by the Commission's order, or (c) because if Corneli denies the conclusiveness of the Commission's action this constitutes a collateral attack which cannot be made.

We shall show that the Union Pacific's position in each and all of the foregoing respects is untenable. First, as to the question of "primary jurisdiction." The complaint which Corneli made before the Commission was that the routes were unreasonably long, and that the rates and charges of Union Pacific, including those on the 14 shipments involved, were therefore unjust and unreasonable, and that a new route through Wells, Nevada, should be ordered and rates established. In addition, Corneli claimed that the combination rates were improperly applied to the shipments in question and were unjust and unreasonable and reparations should be granted (R. 26). The Commission denied the establishment of a new route and dismissed the complaint and did not grant reparations. In its report the Commission said that Union Pacific's transit tariff was not applicable because not complied with, and that the local rates paid in and out of Twin Falls were not shown to have been or to be inapplicable, unjust or unreasonable.

Under the teaching of Great Northern Railway Company v. Merchant's Elevator Company, 259 U. S. 285, 66 L. Ed.

943, l. c. 946, the dismissal by the Commission with respect to the establishment of a new route and fixing rates was obviously legislative and administrative, prospective in character, and within the exclusive jurisdiction of the Commission so as to require its action. The question as to whether the transit tariff had been complied with, that is to say, the applicability of the combined rates where the facts are undisputed, raised a question of law respecting which the courts may act notwithstanding resort to the Commission. In such circumstances the Commission's decision is open to judicial inquiry, since a question of law rather than fact is involved, the facts being undisputed. The election under Section 9 of 49 U. S. C. A. only precluded Corneli from thereafter **initiating** an action in a District Court. This distinction is clearly noted in the case of United States v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451 at l. c. 1459, where the court says that a shipper "could not later **initiate** an original District Court action for the same damages." The statute does not say that a claim for reparations is an election which bars a shipper from **defending** a lawsuit required by law to be brought by the carrier in a District Court. No court has ever so held. Estoppel, res judicata, or election of inconsistent remedies are matters of defense. The controlling case on facts is Baltimore & Ohio Railroad Company v. Owens-Illinois Glass Company (N. D. Ohio 1954), 133 F. Supp. 680, referred to in Corneli's original brief. In the Baltimore case the railroad, as Union Pacific did in this case, sued for failure to pay the so-called lawful rates on shipments of sand. As in the case at bar defendant defended on the ground that the lawful applicable rates had been paid, and that the charges the plaintiff railroad sought to recover were in excess of the lawful charges provided by the lawfully applicable tariff. In the Baltimore case, as here, the railroad claimed the conclusiveness of a prior decision of the Interstate Commerce Commission on the theory that the matter had been decided by the Commis-

sion as a matter of primary jurisdiction. The Commission had decided in favor of the railroad and denied reparation claims and no review was sought. The scholarly opinion of Special Master Fred H. Kruse, which was adopted by the court in the Baltimore case, is an exhaustive and comprehensive analysis of the case law respecting the problem, and contains a review of the cases. The court held, 133 F. Supp., l. c. 691:

> "We cannot agree with the contention of counsel for the plaintiffs that the determination by the Interstate Commerce Commission should be considered as controlling on this court for the reason that the case there was one within the primary jurisdiction of the Commission in which it had to consider matters of fact and extrinsic evidence and applied its expert knowledge in order to determine the issue involved; that its decision involved questions of fact as to the type of sand shipped, the intent of the railroads in their petitions for increase and the intent of the Commission in granting such increase, the reason for the difference in rates when different equipment was used, and the technical meaning of the term 'Noibn' used in the master tariffs. It seems to us that these contentions cannot be sustained, because these matters were not in controversy in this case."

Respecting the application of the principle of res judicata or estoppel by judgment, the court said, l. c. 693:

> "It is apparent that the facts in the case at bar are different from the cases above discussed, and the question remains whether, on the principle of res judicata or estoppel by judgment, this court is controlled by the decision of the Interstate Commerce Commission in the Anchor Hocking Case. (Citing cases.) It would appear from the reports that the principle of res judicata or estoppel by judgment applicable to decisions of the courts has not been applied to determinations of

> the Interstate Commerce Commission or administrative agencies generally."

The court concludes at l. c. 695 as follows:

> "Our conclusion is that under the present state of the law, the determination by the Interstate Commerce Commission in the Anchor Hocking case on the question of law as to the construction of the tariffs involved here is not res judicata or controlling on the court in this case."

Corneli respectfully submits that a careful reading of the 23-page opinion in the Baltimore case leads inevitably to the conclusion that the doctrine of the **Great Northern Railway Company v. Merchants' Elevator Co.**, 259 U. S. 285, 66 L. Ed. 943, is controlling, and that the construction of the Commission is not conclusive in this case because there is no dispute of fact with respect to what the parties did. The only question being whether the transit tariff was thereby complied with.

Union Pacific's reliance on Terminal Warehouse Company v. Pennsylvania Railroad Company, 297 U. S. 500, 80 L. Ed. 827, to the effect that when the Commission finds no damage in a reparation case that its ruling is final and not subject to judicial examination by a court is completely without substance because the Terminal Warehouse case was decided before the Negative Order Doctrine was repudiated, and the Terminal case is simply one of the many cases that were overruled when the court abandoned the idea that denial of reparations relief by the Commission was administratively final and not subject to judicial inquiry. This matter is fully discussed in United States v. Interstate Commerce Commission, 93 L. Ed., l. c. 1462, footnote 8.

Mr. Justice Harlin in the United States v. Western Pacific Railroad Company, 352 U. S. 59, 1 L. Ed. 2d 126, states that "in cases raising issues of fact not within the

conventional experience of judges or requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over . . .''; that primary jurisdiction is ''a doctrine allocating law making power'' (1 L. Ed. 2d, l. c. 132). The field respecting the power of courts to pass on tariff construction as issues of law is recognized and said to have ''emerged'' in Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285, 66 L. Ed. 943. Corneli submits that there is no special administrative competence involved in deciding whether or not what the parties did in this case was a compliance with the transit tariff as a matter of law.

We consider first the cases cited by Union Pacific involving the allocation of jurisdiction. In United States v. Western P. R. Co., 352 U. S. 59, 1 L. Ed. 2d 126, the question was whether certain bomb cases should be classified under a tariff rate for incendiaries or whether they should be classified under a lower tariff rate. In discussing the doctrine of primary jurisdiction the court noted that one of the contentions of the shipper was that the higher rate, if applied, would be ''unreasonable'', thereby intertwining the questions of classification and reasonableness. Because of the complexity of cost factors underlying such a determination, the court correctly concluded that the question should be presented to the Commission in the first instance. The appellant is in complete accord with the principles enunciated in this case. As applied to the case at bar, the question of reasonableness has been presented to the Commission. The only question now before this Court is the construction of the tariff provision on undisputed facts which may be done as a simple matter of law.

In Northwest Auto Parts Co. v. Chicago B. & W. R. Co., 240 F. 2d 743 (8th Cir.), the court in line with Western Pacific decided that the question of classification of scrap under a particular tariff, which also presented a question

of reasonableness, should be referred initially to the Commission.

In United States v. Chesapeake & Ohio Railway Co. (4th Cir. 1957), 242 F. 2d 732, the record failed to show whether or not expert knowledge was required and the court merely remanded the case to the District Court with directions to retain jurisdiction while the question of reasonableness was presented initially to the Commission. This was done merely because in the case at bar the Commission determined questions of reasonableness.

In United States v. Kansas City Southern Railway Co. (8th Cir. 1955), 217 F. 2d 763, a shipper sought to recover for terminal services not actually furnished at the port of shipment. The granting of such an allowance would have clearly involved Commission competence respecting questions of cost allocation since the recovery would have permitted the shipper to obtain a rate lower than the only tariff rate available. The court properly held that the case should be remanded to the District Court with a retention of jurisdiction while the administrative question was referred to the Commission. This case sustains Corneli's contention in that it shows certain questions may be decided by the administrative body, reserving others for the courts.

In Armour & Co. v. Alton R. R. Co., 312 U. S. 195, 85 L. Ed. 771, a shipper sued to eliminate the yardage charge necessitated by the delivery by the carrier other than to the consignee. The court, in holding that prior resort to the Commission was essential, stated:

> "The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. Co., 238 Inters. Comm. Rap. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long standing practice to the Commission. That expert body found it a necessary prerequisite decision to have a trial examiner

conduct extensive hearings, compiling in the process a record of 5 volumes, 1,147 pages and numerous exhibits.''

All of the foregoing cases reiterate the principle with which Corneli agrees, that is, questions presenting complex issues within the administrative expertise should be decided by the Commission, while questions of simple tariff constructions may be passed on by the courts as questions of law.

We next examine cases cited by Union Pacific for the proposition that when primary Commission jurisdiction is present the Commission finding is only subject to review. As we have pointed out, Terminal Warehouse Co. v. Pennsylvania R. R. Co., discussed above, is no longer authority for the proposition that in such a case judicial inquiry is foreclosed respecting a negative finding by the Commission, this proposition having been expressly overruled in the case of United States v. Interstate Commerce Commission, supra. In the latter case the sole issue before the court was the reviewability of a dismissal of a shipper's complaint before the Commission after a finding of no damages, and the action was held to be reviewable.

The case of Johnson Seed Company v. United States (10th Cir. 1951), 191 F. 2d 228, is a typical reasonableness of rates case and involved the review of a determination by the Commission that a certain rate was reasonable in its application to certain shipments of seed. The determination by the Commission was within its primary jurisdiction, and its determination when supported by evidence was binding on the court.

Both the cases of Interstate Commerce Commission v. Martin Box Brothers Co., 219 F. 2d 811 (9th Cir.), and Shipper's Car Supply Commission v. Interstate Commerce Commission, 160 F. Supp. 939 (D. C. Or. 1958), deal with the question of the reasonableness of the carrier in refusing to provide boxcars as specifically provided by the In-

terstate Commerce Act. In stating that the findings of fact of the Commission as to the unreasonable refusal by the carriers are subject to limited review, the courts noted the reluctance of the judiciary to disturb such findings in such cases. However, these cases have absolutely no bearing on the case at bar in that they are not concerned with the construction of a tariff provision on disputed facts, and they are in substance dealing with complex issues, particularly within the Commission's jurisdiction. The case of New Process Gear Corporation v. New York Central R. Co., 250 F. 2d 569, is distinguishable on the same grounds.

The case of Reliance Steel Products Co. v. United States, 150 F. Supp. 118, holds that where primary jurisdiction is present and a negative order is involved that limited review only is available. This is, of course, true in this case respecting the denial of Corneli's application for the establishment of routes and rates and also as to the reasonableness of the combined and transit rates, but the case does not decide that in an admitted fact situation with a question of law involved that the courts are confined to limited review. In the latter situation Great Northern applies and the Commission determination is not conclusive as is pointed out in Baltimore & Ohio v. Owens, supra.

Two cases are cited in support of the argument that Corneli is estopped to assert that the Commission's dismissal order is not conclusive. The first, Callanan Road Improvement Co. v. United States, 345 U. S. 507, 97 L. Ed. 1206, involved a situation where Callanan had acquired an existing certificate of convenience and necessity for operation as a common carrier in New York Harbor and adjacent waters. At the time of transfer the certificate was restricted to freightage. Subsequent to the acceptance of the transfer and operation under it Callanan asked the Commission to construe his certificate to include both freightage and towage. The Commission denied relief. The Supreme Court held on appeal that by having accepted

the certificate limited as it was to freightage and having operated under it for several years, that Callanan was estopped to assert to the contrary, and that the limitation to freightage should have been attacked before the Commission at the time of its approval of the transfer. In other words, Callanan had taken an inconsistent position by acquiescing in the Commission's interpretation and later sought a contrary interpretation. Corneli has at all times adhered to but one position in this case, namely, that the transit rates apply to transit cargo. Therefore, this case has no applicability whatsoever. Furthermore, in Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U. S. 393, 81 L. Ed. 301, the carriers had contended for a particular interpretation of a tariff before the Commission and the holding was adverse to their contention. In a subsequent suit by the shippers on the award of the Commission of reparations to the shipper the Supreme Court expressly held that the carriers were not estopped from maintaining the same interpretation that they urged before the Commission, although they had not appealed from an adverse result. The court further sustained the construction of the carriers and said, l. c. 81 L. Ed. 304, "We so hold despite the construction given the rule by the Commission." The Brown case completely destroys the position of Union Pacific with respect to any argument based on estoppel.

The case of Elbow Lake Coop. Grain Co. v. Commodity Credit Corporation, 144 F. Supp. 54, was an action by grain warehousemen for a determination of the quality and quantity of grain under United States Grain Standards Act wherein the court held that the failure to exhaust administrative remedies would preclude the initiation of an action by the grain warehousemen to determine such quality and quantity. This case is not in point because as expressly held in the Western Pacific case the failure to exhaust administrative remedies has no application to the doctrine of primary jurisdiction.

The foregoing should suffice to demonstrate that the authorities do not support Union Pacific's contention as to the conclusiveness of the Commission's report.

II.

We come now to consider Union Pacific's second question presented which is stated to be that Union Pacific could not waive or condone a practice not authorized by the tariff. As heretofore stated, Corneli is in full agreement with this principle, but the question remains whether or not the furnishing of inbound references after shipment was a compliance with the transit tariff respecting admittedly transit shipments. Corneli submits that such was the case under the admitted facts and law, as has been fully expounded in Corneli's original brief.

Union Pacific cites many cryptic quotations supporting its general proposition, however, it may be helpful to consider the context in which the statements were made. Considering first the statement of this court in National Carloading Corporation v. Atchison, Topeka & Santa Fe Railway Company (9th Cir. 1955), 150 F. 2d 210, to the effect that conduct, intention, mistake and misunderstanding are no defense to an action by a carrier for undercharges. Examining the opinion discloses that the shipper made it a practice to demand a 50 foot car, and induced the carrier to furnish two 40 foot cars. The record shows that there was a collusive agreement, plan and understanding, and a clear violation of the tariff which could not have been for the "carrier's convenience" which if so would have made the substitution permissible under the tariff. Clearly here the carrier got an illegal preference and discrimination. In West Coast Products Corporation v. Southern Pacific Company (9th Cir. 1955), 226 F. 2d 830, two classifications were available for the shipment of olives, one applicable to salt cured olives not preserved in liquid, and the other applicable to olives preserved in liquid. This

court held the olives were salt cured, and that the liquid tariff did not apply. During the course of the opinion the court notes that it had been suggested that some prior shipments had been given the preserved in liquid classification but holds that since the carrier was not subject to estoppel that improper application of the past were no defense to the application of the appropriate rate. This case has no application for the reason that the admitted facts in this case show that at all times past, present and future, Corneli's cargo was, in fact, transit cargo and entitled to transit rates.

In Northern Pacific Railway Company v. Mackie (9th Cir. 1952), 195 F. 2d 641, this court had before it an action against Northern Pacific for damages to a carload of plywood, the defense being failure to file a written claim within the 9 months period. The evidence was that there had been verbal notices, but it is held that the written notice was a condition precedent to recovery, non-compliance with which would open the door to evasion. This class of case is distinguishable from the situation at bar because the giving of written notice of a claim as a condition precedent to recovery creates a statutory bar to the cause of action. Not so in determining when data is to be furnished to secure a transit rate. Any precedent condition can as well be satisfied at the time of a shipment or a short time thereafter so long as the privileged rate is not granted until the data is at hand.

In the case of Frank O. Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U. S. 516, 83 L. Ed. 953, the railroad sued for services rendered in the installation of grain doors, such charge being authorized by the tariff. Before the trial in the District Court the Commission considered the reasonableness of the charge, reducing a charge of a dollar to sixty cents per car. The shippers advised the carriers they would not pay, but demanded that shippers furnish coopered cars. The court held that the railroad

could collect the charge because it was required by the terms of the tariff, notwithstanding shippers' attempt to disclaim liability. This case is cited for the proposition that the court should aid carriers in collecting published charges. We agree.

In Louisville & Nashville Railroad Company v. Maxwell, 237 U. S. 94, 59 L. Ed. 853, the railroad sued a passenger to recover an alleged undercharge. The defense was that there was no undercharge because the passenger could have made the same trip by a different route at the price paid. This defense was rejected because of the fact that the passenger had selected the route, and the availability of other routes was held not to be a defense. Because the court said so long as the proper tariff was not paid for the route selected the carrier must recover the difference. No such question of routes is involved in the case at bar. In Armour & Company v. Atchison, Topeka & Santa Fe Railroad Company (7th Cir. 1958), 254 F. 2d 719, Armour & Company sued the carriers for overcharges by reason of the fact that the aggregate local rates were less than through rates. The action was brought under 49 U. S. C. A., Section 16 (2), reparations having been awarded by the Commission. The railroads defended on the ground that the aggregate rates erroneously included a particular basing point and the rates therefrom when in fact the station had been abandoned, but the railroads had not amended their tariffs to so show. The court held that the published rates were applicable and affirmed a judgment in favor of the shipper against the carrier. During the course of the opinion the court says that the legality of the rate was not dependent upon equities involved, namely the failure of the railroad to amend its tariff. The court also held, however, that the proof did not show the basing point station had been abandoned. In the case at bar no question of amending a tariff is involved. It is stipulated that the combination rates, which the Union Pacific seeks to

collect in this case, are in excess of the transit rate. Therefore, the only question is as to the application of the transit rate.

The cases of Oregon, Washington R. & Nav. Co. v. C. M. Kopp Co. (Wash.), 120 P. 2d 845, 138 A. L. R. 633; Chicago & Alton R. R. v. Kirby, 225 U. S. 155, 56 L. Ed. 1033, and Davis v. Cornwell, 264 U. S. 560, 68 L. Ed. 848, all deal with the question of whether a shipper may recover against a carrier on an agreement to furnish extra services not specified in the transit tariff. These cases are in accord with the general rule that a shipper may not recover against a carrier for a breach of an agreement for extra services not covered under the terms of the tariff. Union Pacific argues that this rule is applicable because the handling of the information which was furnished by Corneli under the claim procedure involved some kind of extra service which would amount to a discrimination in Corneli's favor. Corneli is not seeking anything from the railroad for alleged services which Corneli rendered, and it is submitted that the railroad, whether it received the inbound reference on the outbound bill of lading or later at the time it applied the transit tariff, had only the same so-called service to perform which would consist merely of debiting the tonnage credit with the tonnage of the outbound cargo. In addition, Union Pacific suggests that once the outbound shipment had been made it could no longer determine whether the shipment was entitled to transit privileges. This is an unsupportable contention in view of the fact that the Union Pacific has stipulated that when the claim information had been completed that Corneli's admittedly outbound cargo had applied to it the proper through transit rate. To argue that Union Pacific could not do something that it had done for a period of many years belies the admitted facts in the record. In the Oregon, Washington Railroad case the carrier sued the shipper for transportation charges and was met with a

counterclaim for damages on account of the alleged negligent delay in the transportation of lettuce based upon the failure of the carrier to give notice to the shipper of the accomplishment of a diversion order, in accordance with an alleged custom and practice of the carrier not published in its tariff. Recovery was denied the shipper for the reason that it involved an additional service to the shipper with respect to which a charge could not be exacted unless published. The court therefore held that failure to perform the custom gave no cause of action to the shipper. Corneli submits that there is no question of custom in this case in the sense that the term is used in the cases involving so-called customs and practices as constituting the extension of privileges or facilities to shippers. Davis v. Cornwell dealt with an alleged agreement to furnish a car on a certain day. The Chicago & Alton case was an action by shipper of horses against a carrier on an alleged special contract to give fast delivery to a connecting carrier so as to effect a speedy arrival of the horses at destination. Davis v. Henderson, 266 U. S. 92, 69 L. Ed. 182, was a suit by a shipper for damages for failure to furnish a railroad car, although the shipper had not complied with the requirement of the tariff that the order should have been in writing. This is the classic case on precedent conditions and the strict application thereof in tariff cases. Like the notice provisions in claim cases the principle is invoked to defeat actions brought to recover damages against carriers. There is not involved the question of the application of a lawful tariff when there is a question of which of two tariffs are applicable. The foregoing should suffice to show that this line of cases has no bearing on the issue in this case. One searches in vain for any case cited by Union Pacific which can be said to be controlling in the case here before this court, although as stated at the outset all support the general proposition of Union Pacific's second question presented.

SUMMARY.

To summarize, we think it may be fairly said that Union Pacific's position is that under the doctrine of primary jurisdiction the construction of the transit tariff and whether or not there was compliance with it was a matter within the special competence of the Interstate Commerce Commission, and within the case of United States v. Western Pacific rule, and such being the case the Commission decision is conclusive. Opposed to this Corneli's position is that the construction and application of the tariff was not a question within United States v. Western Pacific's rule, but rather a question within the rule of Great Northern Railway v. Merchant's Elevator Company, supra, in which event a question of law is presented and the decision of the Interstate Commerce Commission is not immune from judicial inquiry. On the construction question Union Pacific asserts that the furnishing of the in-transit data was a precedent condition so as to require the data on the outbound bill of lading, whereas Corneli asserts that so long as the in-transit information was submitted prior to the application of the transit rate, the conditions of the tariff precedent or otherwise were complied with, and the application of the transit rate to the admittedly transit cargo would be the lawful application of the proper rate as required by all of the cases, whereas the application of the combined rate would be the application of an unlawful rate to admittedly transit shipments.

As stated in our original brief, any decision of this court which would apply combination rates to admittedly transit shipments would constitute a triumph of technicality over justice. This is not a plea for equitable considerations, but rather a plea that a reasonable construction be given to the application of the tariff in conformance with what the parties themselves consider to be an appropriate and reasonable construction. The suggestion of Union Pacific that

Corneli in this case engaged on a policy of deliberate evasion of the tariff presupposes that Union Pacific and Corneli were engaged in some sort of illegal and unauthorized conduct when such is not the case. On this record Union Pacific and Corneli were in good faith attempting to comply with the tariff by applying through transit rates to through transit shipments. A decision of this court so holding is respectfully requested.

Respectfully submitted,

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Attorneys for Corneli Seed Company,
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I certify that on the 13th day of November, 1958, I served three full, true and correct copies of the foregoing brief upon the plaintiff (appellee) by enclosing a copy in an envelope addressed to plaintiff's (appellee's) attorney as follows: Mr. L. H. Anderson, General Attorney, Union Pacific Railroad Company, Carlson Building, P. O. Box 530, Pocatello, Idaho, that being his last known address, and depositing the same, postage prepaid, in the United States Post Office at St. Louis, Missouri.

.....
Counsel for Appellant.

Subscribed and sworn to before me this 13th day of November, 1958.

.....
Notary Public.

My term expires: